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*In the Supreme Court of the United States*

OCTOBER TERM, 1983

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PAPAGO TRIBAL UTILITY AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

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BRIEF FOR THE FEDERAL ENERGY REGULATORY  
COMMISSION IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that under the terms of a particular contract between a utility and its customer, allowing rate increases to take effect after proceedings before the Federal Energy Regulatory Commission pursuant to Section 206 of the Federal Power Act, the utility was entitled to increase its rates upon a finding by the Commission that the existing rate was unjust and unreasonable.

2. Whether, in the particular circumstances of this case, the Commission's order setting the effective date of the utility's rate increase was consistent with the "filed rate doctrine."

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 25-41) is reported at 723 F.2d 950. An earlier, related opinion is reported at 610 F.2d 914. The order of the Federal Energy Regulatory Commission on remand (Pet. App. 4-21) is reported at 18 F.E.R.C. para. 61,066 (1982).

## **JURISDICTION**

The judgment of the court of appeals was entered on December 13, 1983. A petition for rehearing was denied on January 12, 1984 (Pet. App. 43-44). The petition for a writ of certiorari was filed on April 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATUTES INVOLVED**

Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 46-49.

## STATEMENT

1. Under the Federal Power Act, 16 U.S.C. 824 *et seq.*, the Federal Energy Regulatory Commission has jurisdiction over wholesale sales of electricity in interstate commerce. Section 205(a) of the Act, 16 U.S.C. 824d(a), declares that all rates and charges for such sales "shall be just and reasonable."

Before a utility may increase its rates, it must file with the Commission a new schedule setting forth the changes to be made in its existing rates. Section 205(e) of the Act, 16 U.S.C. 824d(e), provides that, upon such a filing, the Commission may order a hearing on the lawfulness of the new rates and may suspend them for up to five months, after which they may be collected, subject to refund (with interest) of any portion of the increased rates that the Commission finds is not justified.

Section 206(a) of the Power Act, 16 U.S.C. 824e(a), empowers the Commission to examine existing rates and to establish new ones where it finds, after a hearing, that any rate is "unjust [or] unreasonable." Rate adjustments under Section 206(a) are prospective only, with no power in the Commission to order refunds.

Although Section 205 of the Act seemingly permits utilities to file for rate increases unilaterally and to begin collecting new rates after the statutory notice period and at most a five month suspension, this Court has recognized that a utility may, by contract, waive its right to file for a rate increase. *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Moreover, the Court has specifically held that where a utility enters into such a contract, the Commission may not declare the contractually established rate "unjust" or "unreasonable" under Section 206(a) of the Act "simply because it is unprofitable to the public utility." *Sierra*

*Pacific*, 350 U.S. at 355. Rather, "[i]n such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.*

2. The Papago Tribal Utility Authority (Papago) and the Arizona Public Service Company (APS) are parties to a 1971 contract (Pet. App. 51-72) which called for fixed rates for one year. At the expiration of the first year, the rates were subject to change by the Commission, with "either party \* \* \* free unilaterally" to seek rate changes from the Commission (*id.* at 59).

In 1976, APS filed a proposed rate increase with the Commission. The Commission interpreted the relevant provision of the Papago-APS contract as allowing APS to file for and collect rate increases as provided by Section 205 of the Power Act. Accordingly, the Commission suspended the APS rate increase and permitted the utility to collect the new rates pending the conclusion of administrative proceedings on their propriety.

The court of appeals reversed. *Papago Tribal Utility Authority v. FERC (Papago I)*, 610 F.2d 914 (D.C. Cir. 1979). The court held that the contract language, providing that the contract rates would "remain in effect \* \* \* until changed by the \* \* \* Commission," meant that APS could collect its new rates only after a Commission proceeding and that the Commission must conduct the proceeding under Section 206 of the Act, 16 U.S.C. 824e, the provision relating to Commission-imposed rate changes. Thus, APS could not collect the new rates on an interim basis subject to refund.

3. On August 1, 1978, while *Papago I* was pending in the court of appeals, the Commission completed its administrative proceedings and authorized a new rate for the utility. 4 F.E.R.C. para. 61,101. Following the court of appeals' decision in *Papago I*, the Commission had the task of reconsidering this final rate order, which had been issued under the assumption that the Papago-APS contract permitted unilateral rate increases under Section 205 of the Act. Thus, in the proceedings on remand the Commission had to decide the proper standard for permitting a rate increase under the Papago-APS contract — the "unjust and unreasonable" standard of Section 206, or the *Sierra* "public interest" standard. In addition, the Commission had to determine the effective date of the new rates.

In its order on remand, the Commission held that the *Sierra* "public interest" standard applied only to fixed rate contracts, wherein a utility foregoes the right to seek a rate increase under either Section 205 or Section 206 (Pet. App. 7). Because the contract at issue was not a fixed rate contract for the period after 1972, the Commission concluded that the *Sierra* "public interest" standard was inapplicable here (*id.* at 8-9). Instead, the Commission held that the applicable standard was that of Section 206, under which the utility's existing rates must be found by the Commission to be "unjust" or "unreasonable" before new just and reasonable rates can be approved (Pet. App. 10). Based on the cost calculations adduced in its 1978 order, the Commission concluded that the utility's prior rates were "unjust and unreasonable" under Section 206; the Commission also concluded that the proper effective date for the new rate was the date of its 1978 order (Pet. App. 10-11). The Commission found that this "place[d] all parties in the same position they would have been in if the [Commission] had ruled correctly in the first instance" (*id.* at 10).

4. The court of appeals affirmed (Pet. App. 25-41). Based on its review of the terms of the Papago-APS contract, the court held that, after an initial one-year term, the contract permitted rate changes that are just and reasonable following Commission proceedings under Section 206 of the Power Act (Pet. App. 31-34). In addition, the court upheld the Commission's determination that the rate increase should take effect as of the date of the Commission's 1978 order (Pet. App. 36-41). In so doing, the court concluded that, in the particular circumstances of this case, the Commission's 1978 order approving the utility's new rate as just and reasonable was in substance a finding that the utility's prior rate was unjust and unreasonable.

#### ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this or any other court, and does not warrant review. Petitioner raises two contentions, neither of which has merit. First, petitioner argues that the Commission applied the wrong standard in permitting APS to effect a rate increase; in petitioner's view, the Commission should have applied the more stringent "public interest" standard of *Sierra* rather than the standard of Section 206 of the FPA, which authorizes the Commission to set new rates upon a finding that existing rates are unjust and unreasonable. Petitioner also challenges the Commission's decision to make the increase effective as of the date of its 1978 rate order in this case.

1. Contrary to petitioner's contention (Pet. 9-11), no court has ever held that a contract between a utility and its customers, providing for rate changes after proceedings under Section 206, must be construed as barring any change in rates unless the Commission makes a finding that the existing rates are contrary to the public interest. Indeed, as this Court recognized in *Sierra* (350 U.S. at 355), the parties

are free, under the Power Act, to agree upon the standard governing rate changes.<sup>1</sup> Thus, the question in this case is simply one of construing the APS-Papago contract at issue here.

In its decision below, the court of appeals identified three general categories of contractual arrangements: (1) contracts allowing unilateral rate increases under Section 205 with an increase permitted if the new rates are just and reasonable; (2) fixed rate contracts, as in *Mobile* and *Sierra*, wherein the utility surrenders its right to file for rate increases but the Commission nonetheless may permit an increase if the contract rates are contrary to the public interest; and (3) contracts permitting the utility to file for rate increases but providing that the company may collect them only after a Section 206 proceeding in which the Commission finds that existing rates are unjust and unreasonable (Pet. App. 28-29). The court then turned to the language of the instant contract between APS and Papago.

The relevant portion of the contract (Pet. App. 59) provides for a fixed rate for one year and "thereafter unless and until changed by the \* \* \* Commission \* \* \*, with either party hereto to be free unilaterally to take appropriate action before the Federal [Energy Regulatory] Commission \* \* \* in connection with changes which may be desired by such party." As the court of appeals correctly observed (Pet. App. 31-32), the provision distinguishes between the first year—when a fixed rate is in effect, and "thereafter"—when either party may apply to the Commission to change the rate. Because, under *Mobile* and *Sierra*, a utility

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<sup>1</sup>Of course, as the court of appeals noted (Pet. App. 31), "[t]he Commission's obligation to insure that rates do not violate [the public interest standard] is imposed for the direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser; and it therefore cannot be waived or eliminated by agreement of the latter."

is free at any time to request the Commission to modify even a fixed rate contract if the existing charge is found not to be in the "public interest," the APS-Papago agreement necessarily contemplated that after the first year there would be a less restrictive scheme under which the Commission, on request, could increase an unjust and unreasonable rate.

Petitioner does not refute this analysis. Instead, petitioner claims (Pet. 12-13) that at the time it entered into the contract in this case, neither the Commission nor the courts had specifically held that a contract calling for rate changes following Section 206 proceedings permitted increases on a finding that the existing rates were unjust and unreasonable. Therefore, petitioner asserts, the parties must have contemplated that the "public interest" standard would govern here. This contention is erroneous and, in any event, does not present an issue of general importance warranting this Court's review.

The contract itself contains no indication that rate changes would be allowed only if the existing rates have been found by the Commission to be contrary to the public interest. At most, "[i]t is quite probable \* \* \* that the parties \* \* \* not only had in mind no specific answer to the question here at issue, but did not even understand that the question could be asked." *Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983). In reaching the conclusion that clauses such as the one at issue permit changes in unjust and unreasonable rates, the Commission simply engaged in the common practice of construing a contract in order to fill "contractual gaps." See 3 *Corbin on Contracts* § 534, at 11-12 (1960). Moreover, as the court of appeals noted (Pet. App. 32), if the contract were construed as permitting increases only where the rates fall below the "public interest" level, the clause permitting changes after the initial year would be rendered "virtually meaningless \* \* \* [because]

[+] to public -

interest standard is practically insurmountable; the Commission itself is unaware of any case granting relief under it." Accordingly, the court below properly deferred to the Commission's determination on the "ultimate question of the meaning of the contract" (Pet. App. 34).

2. Petitioner also contends that the Commission's decision setting the effective date of the new rates as of its initial 1978 rate order violates the "filed rate doctrine." This contention proceeds from a faulty premise to an erroneous conclusion.

As originally enunciated by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), and as reaffirmed in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), the filed rate doctrine prohibits a utility from collecting new rates that have not been filed with the Commission, even where the existing filed rates are unreasonably low. In this case, the utility filed the rates at issue with the Commission in 1976. It is true that the court of appeals in *Papago I* construed the APS-Papago contract as requiring that before APS could collect those rates, the Commission first had to issue a final order under Section 206. As the court of appeals concluded in the instant decision (Pet. App. 37-40), however, the Commission in its 1978 order in effect found the existing rates unjust and unreasonable, thus satisfying both the "substantial purpose" of the Section 206(a) requirement (Pet. App. 40) and the contractual condition incorporating that requirement.<sup>2</sup>

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<sup>2</sup>The court of appeals pointed out (Pet. App. 40) that in the same proceedings in which the Commission approved APS's rate increase under its contract with Papago, the Commission also approved similar rate increases under APS's other supply contracts, some of which the Commission recognized from the beginning as requiring Section 206 procedures. In approving those rate increases the Commission expressly stated that the existing rates were unjust and unreasonable. The court of

Petitioner's claim (Pet. 14) that the decision in *Papago I* nullified the 1976 filing is wide of the mark. Although the court of appeals in *Papago I* differed with the Commission as to the legal consequences of the 1976 filing, the court did not question the lawfulness of the filing under the contract. Indeed, the APS-Papago agreement specifically permitted APS to petition the Commission for a rate increase. The court in *Papago I* did nothing more than remand the case to the Commission for further proceedings under Section 206. Thus, there is no merit to petitioner's claim that the only valid rates in effect following *Papago I* were the fixed rates in the contract. Cf. *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982).<sup>3</sup>

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appeals expressed "no doubt \* \* \* that, had it been understood that the present contract was also subject to § 206, it would have been routinely included among the referenced contracts" (Pet. App. 40). The court therefore concluded that it was not "prepared to 'make a fetish' of the § 206 requirement \* \* \* by requiring a three and one-half year deferral of a justified rate increase because, although the facts are clear, not all the magic words were uttered" (Pet. App. 41).

<sup>3</sup>Petitioner's reliance (Pet. 15) on *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (10th Cir. 1984), is entirely misplaced. In *Southern Union Gas*, unlike in this case, the court held that the rate sought to be changed was not found anywhere in the utility's FERC rate schedule.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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